

- (1) Whether the award of the payment of claimant's attorney fees is excessive.

- (2) Whether the Award of the Administrative Law Judge (ALJ) on claimant's application for review and modification provided no medical benefit to claimant.

Claimant originally suffered accidental injury on June 22, 1998. She underwent surgical repair to her back and returned to work for respondent in an accommodated position. Claimant continued in this capacity until April 1, 2003, at which time claimant failed to appropriately dispense medications to patients in the Alzheimer's ward, where she was employed, and failed to appropriately document the incidents in question. As a result of those failures on claimant's part, she was terminated from her employment on April 4, 2003. Extensive litigation occurred regarding the incident in question and whether claimant's termination was justified or if claimant would be entitled to a review and modification of the original award. The review and modification decision will be addressed in a separate award, with this Order of the Appeals Board (Board) dealing only with claimant's request for attorney fees and expenses stemming from that litigation.

Claimant's attorney submitted a time sheet showing 60.1 hours of time expended at the requested rate of \$125 per hour. The ALJ awarded claimant's attorney \$4,500, plus expenses in the amount of \$187.49.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Board finds the Order of the Administrative Law Judge should be modified to grant claimant's attorney attorney fees in the amount of \$7,512.50 and expenses in the amount of \$187.49.

At oral argument on August 31, 2004, respondent's attorney acknowledged that he did not dispute the time sheet presented by claimant's attorney. His dispute centered around the language of K.S.A. 1997 Supp. 44-536(g) which states, in part:

If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.

The Board acknowledges that awarding post-award attorney fees to a claimant's attorney serves a significant purpose.

While this provision is certainly a bitter pill for an employer or his insurer to swallow, it is necessary to assure continued representation of claimant after an award. An additional benefit accrues to all concerned from this added incentive on the part of respondent to resolve post-award disputes without protracted litigation.<sup>1</sup>

K.S.A. 1997 Supp. 44-536(g) makes it the prerogative of the Director to determine an appropriate post-award attorney fee in situations where additional compensation is not awarded,. This statute and others dealing with attorney fees are enacted to enable claimants to obtain competent counsel. They are part of a statutory scheme intended primarily to benefit injured workers by securing the prompt payment of benefits provided by the Workers Compensation Act.<sup>2</sup>

K.S.A. 1997 Supp. 44-536(g) mandates that the attorney fees awarded by the Director be “reasonable and customary.” With the stipulation by respondent’s attorney at oral argument, the decision regarding whether the fees claimed by claimant’s attorney are reasonable and customary is rendered moot. Respondent’s attorney acknowledged that the depositions taken by claimant, with the exception of that of Marilyn Wilson, were depositions that respondent’s attorney would have taken had claimant’s attorney elected to not do so. The Board finds that claimant’s attorney did not overly litigate this matter or, in any way, appear to embellish his charges. Therefore, the Board finds the fees requested by claimant’s attorney to be reasonable under the circumstances and awards claimant 60.1 hours of attorney fee times at the rate of \$125 per hour.

With regard to the expenses requested, the Board notes K.S.A. 1997 Supp. 44-536 makes no mention of expenses when discussing attorney fees. However, K.S.A. 44-510k(c) allows for the awarding of costs when post-award litigation occurs on a claimant’s behalf. “Costs”, as described by that statute, are defined as including,

. . . witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

While the language of K.S.A. 44-510k(c) is not all inclusive, the Board finds that mileage expenses and the costs of obtaining medical records from the various health care providers, as well as postage, are all costs contemplated by K.S.A. 44-510k and, as such, the Board affirms the award to claimant’s attorney for costs in the amount of \$187.49.

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<sup>1</sup> Timothy J. Short, *Attorney Fees for Representing a Claimant After Final Award*, Journal of the Kansas Trial Lawyers Association, Vol. XIII, No. 2, p. 13 (1989).

<sup>2</sup> *Hatfield v. Wal-Mart Stores, Inc.*, 14 Kan. App. 2d 193, 786 P.2d 618 (1990).

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated May 12, 2004, should be, and is hereby, modified, and claimant's attorney is awarded attorney fees in the amount of \$7,512.50 and costs in the amount of \$187.49.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant  
Stephen J. Jones, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director